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November 29, 2021

BY ECF

The Honorable Lorna G. Schofield
United States District Court for the Southern District of New
York 40 Foley Square
New York, NY 10007

Re: Catherine McKoy et al., et al. v. The Trump Corporation, et al., 18-cv-9936
(LGS)

Dear Judge Schofield:

We write on behalf of Plaintiffs in the above-referenced action to request reconsideration of the Court's recent Order (Doc. No. 343) denying Plaintiffs' request to securely make digital copies, at Plaintiffs' expense and with the assistance of an industry-leading vendor, of certain recordings in the possession of Metro-Goldwyn-Mayer Studios Inc. and JMBP, LLC (collectively, "MGM") in order to review footage from two relevant episodes of *The Celebrity Apprentice* featuring ACN. (Doc. No. 340.)

Although "[t]he standard for granting a motion for reconsideration is strict," reconsideration "should be granted" when "the movant identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Town & Country Linen Corp. v. Ingenious Designs LLC*, No. 18 Civ. 5075 (LGS), 2020 WL 996732, at *1 (S.D.N.Y. Mar. 2, 2020). For the reasons set forth below, a significant change in circumstances clearly satisfies that standard here.

* * *

In the joint letter filed by Plaintiffs and MGM on November 19 (Doc. No. 340), Plaintiffs argued that MGM's insistence on "requiring a team of lawyers, including associates and staff, to fly cross-country, stay in hotels, and work on-site at an indoor MGM facility for days or weeks" to review the relevant footage "would impose undue health and safety risks," in light of the "ongoing risks presented by the COVID-19 pandemic." (Doc. No. 340 at 1-2.) On November 23, 2021, the Court disagreed, directing Plaintiffs to "review the requested footage onsite and

designate for secure copying the footage that Plaintiffs believe is relevant to the litigation.” (Doc. No. 343.)

However, in the time since the Court’s November 23 Order, there have been significant “intervening change[s]” in the public health landscape, including substantial “new evidence” of heightened risks and concomitant changes in travel guidance from public health authorities. *See Town & Country Linen Corp.*, 2020 WL 996732, at *2 (granting reconsideration). More specifically, on November 26, 2021, New York Governor Hochul declared a state of emergency “in response to a cold-weather surge of coronavirus infections and the threat of the newly detected [O]micron variant . . . that was recently sequenced in southern Africa.”¹ Today, the World Health Organization warned that “global risk[s] posed by the new Omicron variant of the coronavirus” are “‘very high.’”² The Omicron variant has now been detected in more than a dozen countries (including Canada), and more than sixty countries (including the United States) have imposed travel restrictions in response to it, effecting a “cascade of border closures and travel restrictions that recalled the earliest days of the pandemic.”³ Even worse, Dr. Anthony Fauci “has estimated it will take about two weeks before scientists get the answers” about whether the Omicron variant is resistant to current Covid-19 vaccines.⁴ All of these developments—arising over the course of less than a week—significantly increase the risks inherent in requiring a team of attorneys from my firm to travel across the country, stay in hotels for weeks at a time, and work indoors at an MGM facility in California, with the ever-present risk of the imposition of quarantine and restrictions on their ability to return home. The fact that many attorneys are arranging to spend time with their families during the holidays only heightens these concerns since the “Omicron variant adds new peril to [the] holiday season in California and beyond.”⁵ Indeed, at this point, it is unclear whether a sufficient number of lawyers at my firm would be willing to volunteer for this assignment given the risks involved.

In light of the operative schedule (Doc. No. 326) and the relevance of the footage to Plaintiffs’ claims, it is important that Plaintiffs review the footage as soon as possible. Plaintiffs have proposed a phased approach to production, including the digital copying of certain priority assets that Plaintiffs have identified based on asset lists produced by MGM, all of which can commence promptly and be done safely, securely, and subject to the Protective Order.

¹ Andrew Jeong, *New York declares covid state of emergency as Gov. Hochul says of omicron variant: ‘It’s coming,’* WASH. POST (Nov. 27, 2021), <https://www.washingtonpost.com/health/2021/11/27/new-york-omicron-coronavirus-variant/>.

² Nick Cumming-Bruce, *The W.H.O. says Omicron poses a ‘very high’ risk globally, as questions about the variant remain.*, N.Y. TIMES (Nov. 29, 2021), <https://www.nytimes.com/live/2021/11/29/world/omicron-variant-covid#the-who-says-omicron-poses-a-very-high-risk-globally>.

³ *Id.*; see also Martin Goillandeau and Ivana Kottasová, *Omicron variant puts world in a ‘race against time,’ says EU Commission President*, CNN.COM (Nov. 29, 2021), <https://www.cnn.com/world/live-news/covid-variant-omicron-11-29-21/index.html>; Aditi Sangal, Helen Regan, Brad Lendon, Rob Picheta and Ed Upright, *As Omicron variant cases spread, countries rush to impose travel bans*, CNN.COM (Nov. 29, 2021), <https://www.cnn.com/2021/11/28/world/coronavirus-omicron-variant-spreading-intl/index.html>.

⁴ See Bill Hutchinson, *Fauci says US must prepare for omicron variant: ‘Inevitably it will be here,’* ABC NEWS (Nov. 28, 2021), <https://abcnews.go.com/Politics/fauci-us-prepare-omicron-variant-inevitably/story?id=81422342>.

⁵ Alex Wigglesworth, Sarah Parvini, and Rong-Gong Lin Ii, *Omicron variant adds new peril to holiday season in California and beyond*, L.A. TIMES (Nov. 27, 2021), <https://www.latimes.com/california/story/2021-11-27/new-covid-variant-raises-serious-concerns-for-california-in-holiday-season>.

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(See Doc. No. 340 at 1-2.) At the end of day, as the Court has recognized, Plaintiffs and MGM will have to “secure[ly] copy[.]” at least some footage for production in any event, with Plaintiffs to “bear the reasonable costs” of such production. (Doc. No. 343.) While on-site review would certainly be appropriate in ordinary circumstances, as Your Honor has indicated, Plaintiffs ask the Court to reconsider its prior decision in light of the alarming recent developments posed by the emergence of the Omicron COVID-19 variant in the last several days. Plaintiffs submit that Plaintiffs’ proposed approach is more reasonable and appropriate under the current, recently-changed and still-developing circumstances. (See Doc. No. 341 at 1.)

Respectfully submitted,




Roberta A. Kaplan

cc: Counsel of Record (by ECF)

Application **DENIED**. “A motion for reconsideration should be granted only when the [party seeking reconsideration] identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104 (2d Cir. 2013) (internal quotation marks omitted); accord *Lewis v. Nissan N. Am. Inc.*, 4 Civ. 562, 2021 WL 807126, at *1 (S.D.N.Y. Mar. 3, 2021). The standard “is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked -- matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.” *Cho v. Blackberry Ltd.*, 991 F.3d 155, 170 (2d Cir. 2021) (internal citation omitted). While the Court is mindful of the ongoing COVID-19 pandemic, the Fourth Amended Civil Case Management Plan and Scheduling Order extended the deadline for fact discovery until April 29, 2022. Plaintiffs have ample time to review the footage onsite, as directed by the November 23, 2021, Order. (See Dkt. No. 343.)

Dated: November 30, 2021
New York, New York



LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE